

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

CHELSEA SHAW,
Petitioner,

vs.

JACKSON COUNTY,
Respondent.

LUBA No. 2023-010

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Garrett K. West represented petitioner.

No appearance by Jackson County

ZAMUDIO, Board Member; RYAN, Board Chair; Rudd, Board Member,
participated in the decision.

AFFIRMED

04/24/2023

You are entitled to judicial review of this Order. Judicial review is
governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county planner decision approving with conditions a home occupation use for overnight or short-term lodging.

FACTS

The subject property is 3.27 acres, zoned Rural Residential (RR-00), and developed with an existing dwelling and garage. It is not within an urban unincorporated community or urban growth boundary. Petitioner's property is immediately adjacent to the west and south of the subject property and is zoned Exclusive Farm Use.

The applicants, who are not parties to this appeal, sought approval to operate a short-term rental in living space located above the garage and submitted an application to the county for "Type 1 Review: Home Occupation." Record 23. The county accepted the application and did not provide notice or an opportunity to participate in the county's decision. The county planner's decision approved "Operation of a Home Occupation to use two bedrooms for overnight or short-term lodging" with conditions. Record 1. This appeal followed.

ASSIGNMENT OF ERROR

In a single assignment of error, petitioner argues that short-term rental uses are not allowed in the RR-00 zone and, thus, the county's decision is prohibited as a matter of law and should be reversed. ORS 197.835(9)(a)(D); OAR 661-010-0071(1)(c). In the alternative, petitioner requests remand, arguing that the county committed procedural error that prejudiced petitioner's substantial rights by

1 issuing the decision without providing petitioner notice or opportunity for a
2 hearing. ORS 197.835(9)(a)(B); OAR 661-010-0071(2)(c).¹

3 Petitioner argues that short-term rental is a type of commercial “visitor
4 accommodation” that is not permitted in the RR-00 zone. Jackson County Land
5 Development Ordinance (LDO) 13.2.4(P) defines “visitor accommodation” as a
6 primary commercial use and provides as follows:

7 “(1) *Characteristics; Accessory Uses*

8 “Includes facilities provide lodging where tenancy may be
9 arranged for periods of less than 30 days. Accessory uses may
10 include restaurants, offices, parking, and recreational uses,
11 including swimming pools.

12 “(2) *Exclusion*

13 “(a) Lodging where the residents meet the definition of a
14 family and where tenancy is arranged at a minimum on
15 a month-to-month basis is classified as ‘Household
16 Living.’

17 “(b) Lodging where the residents do not meet the definition
18 of a family and where tenancy is arranged at a
19 minimum on a month-to-month basis is classified as
20 ‘Group Living.’” (Italics in original.)

21 LDO Table 6.2-1 “sets forth the uses permitted within all base zoning
22 districts, except for the resource districts.” LDO 6.2. “A dash (-) indicates that
23 the use type is not allowed in the respective zoning district, unless it is otherwise

¹ Petitioner sets out the standard of review for a findings challenge, but does not develop any argument that the county’s decision does not contain adequate findings. Petition for Review 14. Accordingly, we do not analyze whether the county’s findings are adequate to support the challenged decision.

1 expressly allowed by other regulations of this Ordinance.” LDO 6.2.1(F).
2 Petitioner points out that LDO Table 6.2-1 identifies large and small destination
3 resorts and guest ranches as visitor accommodations permitted in the RR-00 zone.
4 “Hotel or motel” is listed with a dash, indicating that those uses are not allowed
5 in the RR-00 zone. Petitioner points out that the LDO does not expressly permit
6 the short-term rental of dwellings in any zoning district. Petitioner argues that
7 short-term rentals are therefore prohibited in the RR-00 zone.

8 Petitioner relies on *Davis v. Jackson County*, 63 Or LUBA 486 (2011), for
9 the proposition that the short-term rental of a dwelling or portion of a dwelling is
10 a commercial use that is not permitted in the RR-00 zone. As we explain further
11 below, *Davis* does not answer the question presented in this appeal. An overview
12 of the structure of the LDO is helpful in understanding our disposition in *Davis*
13 and distinguishing that case from this appeal. LDO chapter 3 sets out the county’s
14 land use review processes. LDO chapter 4 sets out regulations applicable to
15 resource zones, including the Woodland Resource (WR) zone, a forest resource
16 zone at issue in *Davis*. LDO chapter 6 sets out general use regulations applicable
17 in all zones, including the RR-00 zone. Where specified, LDO chapter 6
18 regulations are also applicable in resource zones. LDO 6.1.² For example, LDO

² LDO 6.1 provides, in part:

“6.1.1 Resource Districts

“Uses established in the resource districts set forth in Chapter 4 are generally not required to comply with the provisions of this Chapter

1 6.4 accessory use and structure regulations apply in non-resource and resource
2 zones, including the RR-00 zone and the WR zone. LDO 6.4.2(A). LDO chapter
3 13 sets out definitions of use categories and terms used throughout the LDO.

4 In *Davis*, the petitioners appealed a county enforcement decision that fined
5 the petitioners for renting their dwelling and property in the WR zone for events
6 and short-term vacation rentals. 63 Or LUBA at 487. The petitioners did not
7 reside on the property. The petitioners argued that a short-term rental is a
8 permitted residential use that is no different than long-term or month-to-month
9 residential rental. We rejected that argument and affirmed the county's
10 enforcement decision. We observed that LDO Table 4.3-1 lists the uses allowed
11 in the WR zone. We observed that the LDO distinguishes between residential
12 tenancies arranged on a month-to-month basis or longer and commercial "visitor
13 accommodations" with a tenancy less than 30 days. We explained:

14 "LDO 13.2. sets out a number of use categories. The use category
15 of 'Residential Uses' includes, in relevant part 'Household Living,'
16 defined as 'residential occupancy of a dwelling unit by a family'
17 where '[t]enancy is arranged on a month-to-month or longer basis.'
18 LDO 13.2.3(A)(1). * * *

6, unless such compliance is expressly indicated in the text of
Chapter 4. For example, accessory uses and structures are allowed
in accordance with Section 6.4.

"6.1.2 All Other Districts

"Uses established in any of the other general use districts, apart from
the resource districts, will comply with all regulations set forth in
this Chapter." (Boldface in original.)

1 “In turn, LDO 13.2.4 describes the county’s commercial uses. LDO
2 13.2.4(P) defines the use category ‘Visitor Accommodation’ as
3 facilities that ‘provide lodging where tenancy may be arranged for
4 periods of less than 30 days.’ Under the foregoing definitions, there
5 is no possible dispute that the short-term vacation rental at issue in
6 this appeal does not fall into any category of residential use, and
7 instead falls squarely into the definition of ‘visitor accommodation,’
8 a commercial use that is not permitted in the WR zone. Contrary to
9 petitioners’ argument, the [LDO] does distinguish between short-
10 term and long-term rental of dwellings. As the relevant use
11 categories are defined, the term of tenancy largely determines
12 whether the rental is a residential use or commercial use.” *Davis*, 63
13 Or LUBA at 488-89 (footnotes omitted).³

³ LDO 13.2.3 describes residential uses. LDO 13.2.3(A) provides:

“Household Living

“(1) Characteristics; Accessory Uses

“Includes residential occupancy of a dwelling unit by a family. Tenancy is arranged on a month-to-month or longer basis. Common accessory uses include recreational and hobby activities, raising pets, gardens, personal storage buildings, and parking of the occupants’ vehicles. Home Occupations, Home Businesses, Detached Living Space and Accessory Dwelling Units are accessory uses that are subject to additional regulations (See Section 6.4).

“(2) Exclusion

“Lodging in a dwelling unit where more than two-thirds (2/3) of the units are rented on a monthly or longer basis is considered a hotel or motel use and is classified as a ‘Visitor Accommodation.’” (Boldface and italics in original.)

LDO 13.2.4 describes commercial/office uses. LDO 13.2.4(P) defines “visitor accommodation” as a primary commercial use for which the characteristics, accessory uses, and exclusions are set out in the body of this decision.

1 Under the category of “commercial uses,” LDO Table 4.3-1 lists two uses
2 in the WR zone: destination resort and home occupation/home business. *Id.* at
3 487. Petitioner observes that the relevant LDO definitions are unchanged since
4 we decided *Davis* and argues that our reasoning in *Davis* controls this appeal.
5 Petitioner is correct that that the relevant LDO definitions are unchanged and
6 under the LDO definitions short-term rentals are commercial and not residential
7 uses. However, some commercial uses are allowed as home occupations and
8 home businesses in both the WR zone and the RR-00 zone, subject to the
9 limitations that apply to home occupations. *See* LDO Table 4.3-1 (listing home
10 occupation/home business as a Type 2 use in forest resource zones); LDO 4.3.7
11 (providing commercial use regulations for home occupation and home business
12 in forest resource zones); LDO 6.4.4(C), (D) (providing use regulations for home
13 occupation and home business uses as accessory uses in all zones).

14 Home occupations “are permitted as a Type 1 use in all residential zones,
15 and a Type 2 use in resource zones, subject to provisions of this Ordinance,”

Both use classifications refer to “family,” which is defined as follows:

“An individual, two (2) or more persons related by blood, marriage, or law; or a group of not more than any five (5) unrelated persons living together in a dwelling unit; or a combination of related and unrelated persons where the total number of unrelated persons does not exceed five (5). Servants having common housekeeping facilities with a family consisting of an individual, or two (2) or more persons related by blood, marriage, or law are a part of the family for purposes of this Ordinance.” LDO 13.3(89).

1 including that “[n]o persons other than residents of the premises will be engaged
2 in a home occupation, unless otherwise allowed in resource zones pursuant to
3 this Ordinance (see Chapter 4).” LDO 6.4.4(C)(3), (5)(g). There is no indication
4 that *Davis* involved a home occupation or home business use. The property
5 owners in *Davis* did not reside on the subject property and the entire dwelling
6 was rented for short-term use. Differently, here, it appears that the applicants own
7 and reside in the dwelling and only a portion of the dwelling will be used for
8 short-term rental. *Davis* does not control the issue in this appeal—whether the
9 county may approve a short-term rental as a home occupation in the RR-00 zone.

10 “The governing body of a county or its designate may allow, subject to the
11 approval of the governing body or its designate, the establishment of a home
12 occupation and the parking of vehicles in any zone.” ORS 215.448(1). As we
13 have explained in the context of resource zones, the term “home occupation” does
14 not describe any particular use or activity. Instead, the county may allow a broad
15 range of activities as home occupations and may impose limits on those uses.
16 *1000 Friends of Oregon v. Marion County*, ___ Or LUBA ___, ___ (LUBA Nos
17 2022-085/086, Feb 16, 2023) (slip op at 9-10); ORS 215.448(2) (“The governing
18 body of the county or its designate may establish additional reasonable conditions
19 of approval for the establishment of a home occupation * * *.”).

20 Home occupation and home business uses are not listed as primary uses in
21 LDO Table 6.2-1. The LDO categorizes home occupation and home business
22 uses as accessory to the primary residential use of “household living” and allows

1 them in “in all zoning districts, except within accessory dwelling units.” LDO
2 13.2.3(A)(1), LDO 6.4.4(C)(2).

3 “The purpose of a home occupation or home business is to make a
4 profit in money. This Section provides standards for home
5 occupations and businesses that permit the limited conduct of a
6 business within a residential dwelling, attached or detached garage,
7 or accessory structures in rural areas without adversely impacting
8 the surrounding area. The standards for home occupations and home
9 businesses in this Section are intended to ensure compatibility with
10 other permitted uses and with the residential character of the
11 property. In resource zones, the provisions of ORS 215.448 also
12 apply.” LDO 6.4.4(C)(1).

13 Petitioner argues that a short-term rental use is a commercial visitor
14 accommodation use that is not permitted in the RR-00 zone because it is not listed
15 in LDO Table 6.2-1. As explained above, home occupations are accessory uses
16 to primary residential uses. In contrast, “visitor accommodations” are primary
17 commercial uses, which may also have accessory uses such as restaurants,
18 offices, parking, and recreational uses. LDO 13.2.4(P). The use at issue in this
19 appeal is the short-term rental of a portion of a single-family dwelling. The LDO
20 lists activities that are prohibited as a home occupation or home business and
21 those lists do not include short-term rentals or visitor accommodations. LDO
22 6.4.4(C)(4), (D)(4).⁴

⁴ LDO 6.4.4(C)(4) explains that “[s]ome uses by their nature have a pronounced tendency to rapidly increase beyond the limits permitted for home occupations and have a character that is more suited to commercial or industrial districts.” Those provisions prohibit the following uses:

1 Petitioner does not explain why the proposed and approved short-term
2 rental may not be permitted as a home occupation in the RR-00 zone. Nothing
3 cited to us indicates that the county may not permit short-term rental, even if
4 properly characterized as a commercial “visitor accommodation,” as a home
5 occupation on land zoned RR-00, so long as the county determines that the short-
6 term rental use satisfies the criteria for a home occupation. In other cases, it has
7 been suggested or not disputed that short-term rentals may be approved as home
8 occupation uses on rural residential zoned land. *See, e.g., Hood River Valley*
9 *Residents’ Committee v. Hood River County*, 77 Or LUBA 7 (2018) (concerning
10 a short-term rental home occupation on property zoned rural residential).

11 Petitioner is incorrect that LDO Table 6.2-1 lists the only visitor
12 accommodation uses permissible in the RR-00 zone. The LDO allows home
13 occupation and home business uses in all zones, and does not prohibit short-term

“(a) Auto or vehicle oriented (repair, painting, detailing, wrecking, transportation services, or similar activities);

“(b) Retail sales or professional services, other than by appointment only; and

“(c) Large appliance repair; and

“(d) All marijuana production, processing, wholesaling and retailing/dispensing; and

“(e) All psilocybin production, psilocybin processing, psilocybin testing laboratories, and psilocybin service centers.”

LDO 6.4.4(D)(4) contains almost identical language prohibiting certain home businesses.

1 rentals as home occupation uses. LDO Table 6.2-1 does not list home
2 occupation/home business as a separate use most likely because those uses must
3 be accessory to a primary residential use. We cannot say as a matter of law that
4 short-term rental uses are not allowed as a home occupation in the RR-00 zone
5 or that the county's decision is prohibited as a matter of law. We proceed to
6 petitioner's alternative procedural argument.

7 Alternatively, petitioner argues that the county erred in processing the
8 application using a Type 1 review. Petitioner argues that county staff applied
9 discretionary review criteria and significant legal and factual judgment and that
10 the county should have reviewed the application as a home business using a Type
11 3 review, which requires notice and opportunity for a hearing.

12 Home occupations are permitted as a Type 1 use in all residential zones.
13 LDO 6.4.4(C). A Type 1 use "is allowed by-right in the respective zoning district,
14 subject to review and approval of a plot plan showing compliance with all other
15 applicable regulations of [the LDO]." LDO 6.2.1(A). LDO 3.1.2 reiterates that
16 Type 1 uses are authorized by right, and describes the review process as

17 "requiring only non-discretionary staff review to demonstrate
18 compliance with the standards of this Ordinance. A Zoning
19 Information Sheet may be issued to document findings or to track
20 progress toward compliance. Type 1 authorizations are limited to
21 situations that do not require interpretation or the exercise of policy
22 or legal judgment. Type 1 authorizations are not land use decisions
23 as defined by ORS 215.402."

24 County planning staff applied the following criteria for home occupations:

25 "(a) There will be no signs other than as permitted by Section 9.6;

1 “(b) The home occupation use, unless approved as a home business
2 under Section 6.4.4(D), will not result in more than two (2)
3 additional vehicles parked at the site of the home occupation at any
4 given time. Any need for parking created by the conduct of a home
5 occupation will be met off-street in a location other than in a
6 required front yard setback, and in compliance with the standards in
7 Section 9. 4. In no event may the home occupation displace required
8 parking on the site without replacement in-kind;

9 “(c) In no way will the appearance of the structure be altered or the
10 home occupation conducted in a manner that would cause the
11 premises to differ from its residential character either by the use of
12 colors, materials, construction, lighting, signs, or the
13 generation/emission of sounds, noises, fumes, glare, or vibrations,
14 using normal senses and taking measurements from any lot line of
15 the parcel;

16 “(d) Electrical or mechanical equipment that creates visible or
17 audible interference in radio or television reception or causes
18 fluctuations in line voltage outside of the home occupation will be
19 prohibited;

20 “(e) Home occupations will not store or warehouse, or use in their
21 processes, materials which are Class 1 flammables as defined by the
22 Uniform Fire Code;

23 “(f) The home occupation will be completely conducted within an
24 enclosed building. There will be no outside storage, display of
25 goods, materials, supplies or equipment of any kind related to the
26 home occupation;

27 “(g) No persons other than residents of the premises will be engaged
28 in a home occupation, unless otherwise allowed in resource zones
29 pursuant to this Ordinance (see Chapter 4);

30 “(h) A home occupation within an urban unincorporated community
31 or urban growth boundary will be conducted only within the
32 enclosed dwelling unit or garage;

33 “(i) A home occupation outside an urban unincorporated community

1 or urban growth boundary may be conducted within a garage,
2 accessory structure, or lawfully permitted dwelling; and

3 “(j) A home occupation may be subject to licensing when and if such
4 a program is enacted by the County.” LDO 6.4.4(C)(5).

5 Petitioner does not argue that any of those criteria require interpretation or
6 the exercise of policy or legal judgment. Petitioner also does not argue that the
7 county misconstrued those criteria, or that the county’s findings that those criteria
8 are satisfied are inadequate or unsupported by substantial evidence.

9 Home businesses are more intensive uses than home occupations and are
10 permissible as a Type 3 use in a residential zone. LDO 6.4.4(D). A Type 3 use
11 “is conditionally allowed only if reviewed and approved in accordance with the
12 Type 3 review procedures of Section 3.1.4. Some uses may also require approval
13 of a site development plan pursuant to Section 3.2.” LDO 6.2.1(D).

14 “The purpose of the Type 3 Land Use Permit is to allow the
15 development of uses that may be suitable only in specific locations
16 or if the site is regulated in a particular manner. Uses that require a
17 Type 3 Permit may be allowed subject to findings of compliance
18 with applicable approval criteria and development standards, and
19 submission of a site development plan (Section 3.2.4) when physical
20 development is proposed as part of the permit. Type 3 decisions
21 require a notice of decision and opportunity for hearing.” LDO
22 3.1.4.

23 Petitioner argues that the short-term rental of a portion of the applicants’
24 dwelling might qualify as a home business bed and breakfast under LDO
25 6.4.4(D)(6), which provides, in part: “A Bed and Breakfast is a type of home
26 business that provides temporary travelers’ accommodations and breakfast, for a
27 fee, on a daily or weekly room rental basis, as an accessory use in an existing

1 structure designed for and occupied as a single-family residence.” It is not clear
2 to us that the short-term rental use is properly characterized as a bed and
3 breakfast. Petitioner does not point to any evidence that the applicants intend to
4 provide breakfast to temporary occupants or that the use is otherwise properly
5 characterized as a home business rather than a home occupation. *See* LDO
6 13.3(127) (“HOME BUSINESS: The most intensive type of home occupation,
7 which allows up to five (5) non-resident employees. *See* Section 6.4.4(D).”
8 (Underscoring in original.)). Petitioner does not otherwise explain why the
9 county should have reviewed the application as a home business using a Type 3
10 review instead of as a home occupation using a Type 1 review.

11 In petitioner’s standing statement, petitioner argues that petitioner was
12 entitled to notice under ORS 215.416(11)(c), which requires the county provide
13 notice of a “statutory permit,” which “means discretionary approval of a proposed
14 development of land.” ORS 215.402(4). Petitioner does not develop any
15 argument explaining why the challenged decision is a statutory permit.

16 Petitioner has not established that the county committed substantive or
17 procedural error by approving the application for a short-term rental as a home
18 occupation under a Type 1 review. Accordingly, petitioner has not established
19 any basis for reversal or remand of the challenged decision.

20 The assignment of error is denied.

21 The county’s decision is affirmed.